(12)

Supreme Court, U.S.
FILED
DEC 6 1993
OFFICE

No. 93-70

IN THE

Supreme Court Of The United States

October Term, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,

Respondents.

On Writ of Certiori to the Supreme Court of the State of Oregon

---

Brief Of The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, As Amici Curiae In Support Of Respondents

---

PAMELA CARTER
ATTORNEY GENERAL OF INDIANA

AREND J. ABEL*
MATTHEW R. GUTWEIN
MYRA P. SPICKER
DEPUTY ATTORNEYS GENERAL

219 State House
Indianapolis, Indiana 46204
(317) 232-6243

Counsel for Amicus, State of Indiana
*Counsel of Record

(For Additional Counsel *see* inside cover)

BEST AVAILABLE COPY

ADDITIONAL COUNSEL FOR AMICI

Winston Bryant
Attorney General of Arkansas
Office of the Attorney General
Tower Building
323 Center Street
Little Rock, Arkansas 72201-2610

Robert A. Butterworth
Attorney General of Florida
Office of the Attorney General
The Capitol
PL 01
Tallahassee, Florida 32399-1050

Chris Gorman
Attorney General of Kentucky
Office of the Attorney General
State Capitol Building
Frankfort, Kentucky 40601

Michael E. Carpenter
Attorney General of Maine
Department of the Attorney General
State House Station 6
Augusta, Maine 04333

Mike Moore
Attorney General of Mississippi
Office of the Attorney General
Department of Justice
P.O. Box 220
Jackson, Mississippi 39205-0220

Joseph P. Mazurek
Attorney General of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1401

Lee Fisher
Attorney General of Ohio
Office of the Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410

Susan B. Loving
Attorney General of Oklahoma
Office of the Attorney General
State Capitol
2300 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105

Ernest D. Preate, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
Strawberry Square
Fifteenth Floor
Harrisburg, Pennsylvania 17120

T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
Rembert C. Dennis Office Building
Post Office Box 11549
Columbia, South Carolina 29211-1549

Mark Barnett
Attorney General of South Dakota
Office of the Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070

Joseph B. Meyer
Attorney General of Wyoming
Office of the Attorney General
State Capitol Building
Cheyenne, Wyoming 82002

James E. Doyle
Attorney General of Wisconsin
Wisconsin Department of Justice
Post Office Box 7857

QUESTION PRESENTED FOR REVIEW

Whether a State that chooses to finance its environmental protection programs through general taxation is required by the negative implications of the Commerce Clause[1] to subsidize those programs for waste that is generated elsewhere and shipped to the State for final disposal.

---

[1]U.S. Const. Art. I, § 8, cl. 3: "The congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICI 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. A Tax Which Burdens Interstate Commerce is Facially Valid Unless it Is Discriminatory in Operation Under All Circumstances 7

II. Petitioners Have Not Shown That the Fees Are Actually Discriminatory in Their Operation 11

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) 9, 16, 17

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 10, 14-15, 17

California v. Grace Brethren Church, 457 U.S. 393 (1982) 10

Carpenter v. Commonwealth, 831 S.W.2d 188 (1992) 3

Chambers Medical Technology of South Carolina, Inc. v. Jarrett, et al., No. 2-90-1360-8 (D.S.C) 4

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 8, 13

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 10, 12

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 13, 18

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972) 14

Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267 (1992), cert. denied, 113 S. Ct. 977 (1993) 1

Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) 18

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 9, 10, 13

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 9, 12, 13, 18

Maine v. Taylor, 477 U.S. 131 (1986) 8

Maine Energy Recovery Co. and Penobscot Energy Recovery Company v. Huber, No. CV-92-473 (Super. Ct. of Kennebec County) 3

Maryland v. Louisiana, 451 U.S. 725 (1981) 7, 8, 13-14, 17-18

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 9

Northwestern States Portland Cement Co v. Minnesota, 358 U.S. 450 (1959) 7

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 10

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) 10, 15, 16, 17

Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 18

Federal Constitutional Provisions And Statutes

U.S. Const. Art I, § 8, cl. 3 ..... *passim*

Tax Anti-Injunction Act, 28 U.S.C. 1341 10

State Constitutional Provisions And Statutes

Ala. Const. Amd. 523 4

Cal. Pub. Res. Code § 41903 4

Ind. Code 13-9.5-5-1(b) 2

Iowa. St. § 455B.310(2)(a) 4

Kan. Stat. § 65-3415e 4

Ky. Rev. St. 68.178 2-3

La. Rev. St. 47.823(C) 5

Me. Rev. St. § 2203 3

Me. Rev. St. § 2204(3) 3

Minn. St. § 115A.919(2) 4

Miss. St. § 17-17-53(3) 4

Miss. St. § 17-17-219(2) 4

Mo. St. 260.203(8) 4

Mont. St. § 75-10-118 (Statement of Legislative Intent) 4

Mont. St. 75-10-204 4

N.H. St. 147-B:8(III) 4

N.M. St. § 74-9-39 4

Ohio Rev. Code § 3734.57(B) 4

27A Okla. St. § 2-10-802(A) 4

27A Okla. St. § 2-10-803(A) 4

S.C. Code Ann. § 44-96-80(L) 4

S.C. Code Ann. § 44-93-160 (Supp. 1992) 4

Vern. Tex. Ann. Code § 361.136(j) 4

W. Va. Code §20-5f-5a 5

No. 93-70

IN THE

Supreme Court Of The United States

October Term, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,

Respondents.

On Writ of Certiori to the Supreme Court of the State of Oregon

---

Brief Of The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, As Amici Curiae In Support Of Respondents

---

INTERESTS OF THE AMICI

The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, support affirmance of the judgment below. Because of their economic and geographic circumstances, each of the Amici has either already become, or has the potential to become, a recipient of large volumes of waste that are shipped in interstate commerce.

Like the citizens of Oregon, citizens of the Amici States and Commonwealths support environmental protection programs relating to solid waste through a variety of user fees and general

taxation. Under such a regime, the waste disposal activities of residents of other states who do not pay the general taxes used to support the environmental programs will be subsidized by the citizens of the Amici States and Commonwealths unless the Amici are allowed to charge an additional fee on the disposal of waste generated in other States. Each of the amicus States and Commonwealths has a strong interest in assuring that its taxpayers and citizens not subsidize the additional costs imposed on its jurisdiction by the shipment of such waste from other jurisdictions for disposal. Therefore each of the Amici has a strong interest in requiring those who generate waste in other states and ship that waste to the Amici States and Commonwealths for final disposal to pay a fair share of the costs of state programs designed to minimize the environmental harm from such waste disposal activities.

Some of the Amici have already attempted to accomplish this legitimate goal by imposing an additional fee on waste shipped from other jurisdictions in an amount necessary to offset what would otherwise be a subsidy for that waste, as the State of Oregon has done in this case. Indiana, for example, enacted a statute authorizing such an additional fee. Ind. Code § 13-9.5-5-1(b). However, before Indiana could act through its rulemaking process to calculate the amount of the additional fee necessary to offset the subsidy that would otherwise be provided to waste generated in other states, the United States Court of Appeals for the Seventh Circuit determined that any such fee, regardless of amount or relationship to the State's costs, was barred by the negative implications of the Commerce Clause and ordered any attempt to enforce the statute permanently enjoined. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

The Commonwealth of Kentucky enacted legislation authorizing an additional fee on waste disposed of outside the waste management district in which it was generated. Ky. Rev. St.

68.178.[2] The Kentucky Supreme Court upheld the provision against a Commerce Clause challenge similar to the one mounted by petitioners in this case. *Carpenter v. Commonwealth*, 831 S.W.2d 188 (1992).

The State of Maine has also enacted legislation imposing an additional fee on imported waste "[t]o support those regulatory and administrative costs associated with imported municipal solid wastes." Me. Rev. St. § 2204(3).[3] The validity of these statutes under the Commerce Clause is currently in litigation. *Maine Energy Recovery Co. and Penobscot Energy Recovery Company v. Huber*, No. CV-92-473 (Super. Ct. of Kennebec County).

Montana law provides for Montana's Department of Health and Environmental Sciences to set an additional fee "based on the justifiable direct and indirect costs to the state of administering [its environmental laws] for solid waste generated outside Montana and disposed of or incinerated within Montana." Mont. St. 75-10-204.[4]

---

[2]The Kentucky statute expressly required a demonstration of additional governmental services that are required by the imported waste before a differential fee can be assessed.

> [B]efore a fee differential may be imposed the county or urban-county government shall demonstrate that the differential is reasonably related to additional government services which must be undertaken because of the landfilling of non-planning area waste.

Ky. Rev. St. 68.178(2)(b). Additionally, the additional fee is strictly limited in amount and may not exceed one-quarter of the base fee charged on all waste disposed of at the particular facility, regardless or origin. *Id.*

[3]Maine has a parallel fee for imported "special waste," a category that includes, among other things, asbestos, oil spill debris, residuals from soil decontamination, wastewater facility sludge, ash, coal, oil, paper mill sludge, sandblast grit, ash from municipal solid waste, and other industrial wastes. Me. Rev. St. § 2203.

[4]After July 1, 1995, the fee will be statutorily set at $5.00 per ton for large facilities and for all incinerators, unless the Montana Legislature statutorily

Ohio statutory law currently provides for a fee on waste disposed of in a county other than its county of origin, and also imposes a fee on waste from other states at a rate of one and one half times the out-of-county amount; after January 1, 1994, waste from other States will be charged the "in-county" amount. Ohio Rev. Code § 3734.57(B).

The State of South Carolina has levied a similar fee on infectious waste that is imported from other jurisdictions. S.C. Code Ann. § 44-93-160 (Supp. 1992). The validity of the fee is in litigation. *Chambers Medical Technology of South Carolina, Inc. v. Jarrett, et al.*, No. 2-90-1360-8 (D.S.C.).[5]

At least 11 other States have enacted legislation that either imposes or authorizes similar fees.[6] Even those States that have

---

adopts the fee set by the Department of Health and Environmental Sciences. *See* Mont. St. § 75-10-118 (Statement of Legislative Intent).

[5]South Carolina also imposes an additional fee of $10.00 per ton on solid waste not generated in South Carolina, or, alternatively, requires such waste to be assessed the same fees it would be assessed in the sending state. S.C. Code Ann. § 44-96-80(L). Mississippi similarly requires that solid waste be assessed a fee at the rate it would be assessed in the sending State, or the Mississippi rate, whichever is higher. Miss. St. § 17-17-53(3); 17-17-219(2).

[6]*See* Ala. Const. Amd. 523 (requiring additional fee of $60.00 per ton on out-of-state waste disposed of in St. Clair County); Cal. Pub. Res. Code § 41903 (authorizing cities and counties to assess reasonable fees on waste from outside city or county); Iowa St. § 455B.310(2)(a) (imposing fee on waste shipped from outside the service area in which disposal facility is located at 300% of fee on wastes from within service area); Kan. Stat. § 65-3415e (requiring counties to charge additional fee on waste generated outside county unless board of county commissioners unanimously votes not to do so); Mo. St. 260.203(8) (imposing charge of 10% of processing facility charges on infectious waste transported more than 300 miles); Minn. St. § 115A.919(2) (authorizing counties to impose additional fee on waste collected outside county); N.H. St. 147-B:8(III) (imposing additional fee of $.003 per pound on out-of-state hazardous waste); N.M. St. § 74-9-39 (providing for additional fee on waste generated outside the solid waste district); 27A Okla. St. §§ 2-10-802(A) and 803(A) (imposing a fee of $1.50 per ton on waste and $5.00 per ton for sludge from other states and authorizing environmental agency to set fee of not more than ten times fee on in-state wastes); Vern. Tex. Ann. Code § 361.136(j) (authorizing environmental

not yet found it necessary to impose additional fees on waste shipped from other States wish to retain the flexibility to do so should future circumstances warrant.

The Amici believe this Court should affirm the judgment of the Oregon Supreme Court and enunciate the standards by which a State may eliminate a subsidy to waste generation in other states, thereby allowing the States to retain a range of options by which their policymakers can solve problems generated by increased importation of waste.

SUMMARY OF THE ARGUMENT

This Court has consistently held that the mere fact that a fee or tax imposes some burden on interstate commerce is not, standing alone, sufficient to invalidate it under the Commerce Clause. Instead, the critical inquiry is whether the fee or tax will actually operate in a manner that discriminates against interstate commerce. Thus, the Court has upheld fees and taxes that seemingly apply *only* to interstate commerce because, when considered with other aspects of a State's statutory scheme, the statutes equalized the burdens between local and interstate commerce. The consistent theme running through this Court's decisions under the negative implications of the Commerce Clause is equality of treatment of interstate and local commerce, because it is well established that interstate commerce may be constitutionally made to pay its fair share of the costs of state services from which it benefits.

Moreover, where, as here, a statute is challenged on its face, this Court has consistently held that the challenger must show that the statute would be invalid in all its applications. It is not enough to show that, under some conceivable set of circumstances, the statute might be unconstitutional. Applied to the Commerce

---

commission to impose additional fee on out-of-state hazardous waste or industrial solid waste by rule); W. Va. Code §20-5f-5a (fee on solid waste generated outside the solid waste "shed"); *cf.* La. Rev. St. 47:823(C) (requiring hazardous waste to be charged fee at rate equal to that of sending state, or the Louisiana rate, whichever is higher).

Clause, those precedents require that a challenger show a statute unconstitutionally discriminates against interstate commerce in all its applications.

Petitioners have not met that burden in this case. Indeed, they cannot show that the Oregon fee in question actually discriminates against interstate commerce under any circumstances, much less under all circumstances, a showing they must make before the fee can be declared facially invalid. Those who generate waste in Oregon already pay through general taxation for the range of state services necessary to ensure safe disposal of the waste, but those who generate waste in other States generally do not pay the in-state taxes necessary to ensure safe disposal of the waste in Oregon. The fee in question merely eliminates what amounts to a subsidy Oregon citizens are currently paying for safe disposal of waste generated elsewhere. Thus, the fee does not discriminate against interstate commerce, but merely assures that interstate commerce will pay its fair share of the State's costs.

This Court's decisions in the "compensating tax" area have consistently adhered to the principle of equality of treatment, upholding fees and taxes that resulted in such equality, and striking down those that resulted in inequality. Moreover, the Court's cases purportedly requiring a similar tax on a "substantially equivalent event" were all decided in the context of State taxes purporting to equalize the burdens caused by other State taxes that were not tied in any manner to the State's costs resulting from the taxed activity. As such, they provide no precedent for applying the "substantially equivalent event" test to Oregon's cost-based fee.

Petitioner's argument, if accepted, would require Oregon to either continue to subsidize the disposal of waste shipped from other States or totally restructure its tax system from one of general taxation to one based wholly on user fees. Nothing in the

Commerce Clause requires or even permits this Court to so drastically curtail traditional State prerogatives.

ARGUMENT

The fact that Oregon imposes a fee on the disposal of waste generated elsewhere does not by itself violate the Commerce Clause. Rather, petitioners must show that the fee *discriminates* against interstate commerce *in its actual operation*. Moreover, given that petitioners brought their claims as a facial challenge to the fees, it is not enough for them to show that the fees might, under some circumstances, be discriminatory. Rather, they must show that there are no circumstances in which the fees might constitutionally be applied. Petitioners cannot meet this burden because the fees merely eliminate a subsidy that would otherwise exist for waste shipped in interstate commerce to Oregon. Accordingly, the fees do not discriminate, and do not violate the Commerce Clause.

I. A Tax Which Burdens Interstate Commerce is Facially Valid Unless it Is Discriminatory in Operation Under All Circumstances

This Court long ago recognized that the fact a state fee or tax burdens interstate commerce marks the beginning, rather than the end of the inquiry under the Commerce Clause. "[A] state tax that burdens interstate commerce is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (multiple citations omitted). Rather, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Id.* at 759. Thus, as the Court has noted, "While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959).

In conducting such an inquiry, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is [the Court's] duty to determine whether the statute under attack, whatever its name may be, *will in its practical operation work discrimination against interstate commerce*.'" *Maryland v. Louisiana*, 451 U.S. at 756 (emphasis added; citations omitted). Stated another way, the label "discriminatory" represents the Court's *conclusion* regarding the presumptive validity of a state exaction, rather than an independent analytical step.[7]

At some points in their brief, petitioners seem to concede that they must establish not only a facial disparity, but also discriminatory operation. Thus, according to petitioners:

> The test for determining whether a state exaction is unconstitutionally discriminatory was set out by this Court in *Chemical Waste Management* — if the state law "discriminates *both* on its face *and* in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake'"

Pet. Br. at 18 (emphasis added; other alterations by petitioners). At various other points in their brief, however, petitioners seem to *assume* that the fact the fee applies only to waste generated in other States establishes its discriminatory nature. *E.g.*, Pet. Br. at 10-14.

Petitioners apparently believe the fact that the Oregon fee applies only to waste shipped from other States conclusively establishes its discriminatory nature. However, that view is plainly

---

[7]Of course, even a State law that is discriminatory may be sustained against a Commerce Clause attack if the State demonstrates sufficient justification for the discrimination. *E.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986). However, the point in this case is that the Oregon fee, properly viewed, is not discriminatory in the first instance.

out of line with the approach this Court has consistently taken. *Compare Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (holding use tax that applied *only* to interstate commerce nondiscriminatory when considered in conjunction with sales tax), *with American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) (holding facially neutral flat marker and axle fees discriminatory because they imposed a greater per-mile cost on interstate commerce). As the Court has noted, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

Thus, as the Court held in *Henneford v. Silas Mason Co.*, the seminal case on the "compensating tax" doctrine, the Commerce Clause is not violated if:

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of [the activity] than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.

300 U.S. at 584.

Moreover, because they have chosen to bring their claims as a facial challenge to the Oregon rules, petitioners cannot prevail unless they show that there are *no* circumstances under which the challenged provisions could be valid. *See New York State Club Ass'n. v. City of New York*, 487 U.S. 1 (1988) (In a facial challenge, the challenger must show that "the challenged law . . . 'could never be applied in a valid manner.'"). Thus, as this court has recognized:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Rust v. Sullivan, 111 S.Ct. 1759, 1767 (1991) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), alterations by the Court); *see also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984) ("[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."); *id.* at 796 (statute considered invalid "on its face" where "it is unconstitutional in every conceivable application").[8]

Thus, unless petitioners can show that the fee in actual operation will discriminate against interstate commerce "in every conceivable application," the fee is facially valid. As shown in greater detail below, petitioners cannot sustain that burden because those who generate waste in Oregon already pay the costs of the State's efforts to assure its safe disposal through general taxation, while those who are without the State do not. Thus, Oregon's imposition of those costs, and only those costs, on the disposal of imported waste merely assures that "the sum is the same when the reckoning is closed."[9]

---

[8]Nor should this Court ignore the procedural posture of petitioners' challenge and treat this case as an "as applied" challenge, as Petitioners invite the Court to do. Pet. Br. at 26-31. It was Petitioners who chose to challenge the statutes in this procedural context rather than contest the fee when it was assessed. Accordingly, petitioners must meet the burdens of a facial challenge.

[9]Because of the procedural posture of this case, it would be inappropriate for this Court to determine that particular elements of the fee are excessive, an issue not decided by the Oregon Supreme Court. Such a challenge would properly be made in the context of a State-court suit for refund of the allegedly excessive portion of the fee. It is no accident that this Court's recent decisions on the constitutionality of State Court fees and taxes have frequently arisen in such a context. *E.g., Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963); *cf. Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (claim arose in State Court tax deficiency proceedings). The Tax Anti-Injunction Act, 28 U.S.C. § 1341, generally precludes federal declaratory or injunctive relief against such taxes. *See California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982)

II. Petitioners Have Not Shown That the Fees Are Actually Discriminatory in Their Operation.

In this case, petitioners have not shown that the additional fee is discriminatory under any circumstances, much less under all circumstances. The fee merely eliminates a subsidy that would otherwise exist for interstate waste disposal.[10] Oregon residents already pay the costs that the State incurs to assure the safe disposal of solid waste through a variety of state taxes. However, those who generate waste in other States do not pay the in-state taxes necessary to support those state activities. Thus, the challenged fee merely equalizes the costs among all users and assures that interstate commerce "pays its fair share." In fact, without the additional fees, disposal of waste from other States is subsidized by Oregon, with its taxpayers bearing full brunt of the costs necessary to assure the safe disposal of not only their own waste, but that of others as well. The additional fee merely eliminates this unfair subsidy, and in no manner works a "discrimination" against interstate commerce. Oregonians already pay their fair share of the costs of waste disposal regulation and cleanup through in-state taxation. The additional fee simply assures that those who wish to take advantage of Oregon's low private disposal costs do not get a free ride.

This nondiscriminatory aspect of the fee is perhaps best demonstrated by considering other possible situations in which such a fee might be imposed. Suppose, for example, that a State decided to fund its solid waste programs by setting aside some portion of its sales and use taxes, or even by an additional sales or use tax levy devoted to that purpose. Such a decision would be eminently rational, as a State could view its solid waste problem as a function of excessive consumption, and could determine that the tax paid on the sale or use of a product in the State should include an amount

---

[10]The Oregon Supreme Court characterized the additional fee as a "compensatory fee" because it is based upon and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed. Pet. App. 41a n.19

sufficient to ensure the safe disposal of the product when it reaches the end of its useful life. Waste generated in other states, however, by hypothesis consists of the discards from products that have never been subject to the taxing state's sales or use taxes. Thus, the State instead imposes an equivalent levy on waste disposal for such products, even though disposal of waste generated in the State is not taxed as such. In such a circumstance, "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of [his consumption] than the dweller within the gates." *Henneford v. Silas Mason Co., supra.* Though the resident may pay his tax on one incident or transaction, and the nonresident on another, when the reckoning is closed, the sum is the same. *Id.* While Oregon, apparently, does not impose sales or use taxes, its decision to fund its governmental operations through other forms of taxation[11] should not preclude Oregon from requiring interstate commerce to pay its fair share of costs that interstate commerce otherwise does not pay in any form.[12]

Alternatively, a State could, as petitioners suggest, impose an equally high fee on both in state and out of state waste, but further provide taxpayers who are required to pay the fee, either directly or indirectly, with a credit against their general state tax bills, or a direct cash subsidy, in recognition of the fact that their taxes have

---

[11]The general tax scheme of Amicus South Dakota, for example is roughly the converse of Oregon's, in that it imposes sales and use taxes, but not income taxes.

[12]Petitioners' claim that those who generate waste in other States somehow already *do* pay their fair share of the State's costs, Pet. Br. at 25-26 is unsupported. While it is true that interstate businesses pay taxes on their business activities *in Oregon*, it is equally true that any waste such companies generate *in Oregon* is not subject to the additional fee. Moreover, petitioners' argument on this score fails to recognize the limitations imposed by the fact they have brought a facial challenge to the fee. It is not enough for them to show that some hypothetical interstate business might pay for the State's solid waste services both through general taxation and the additional fee. Rather, they must show that the fee "is unconstitutional in every conceivable application" and "could never be applied in a valid manner." *City Council v. Taxpayers for Vincent*, 466 U.S. at 796, 797-98.

already paid for the services for which the fee is assessed. There is nothing in this Court's jurisprudence that would suggest such a regime would violate the Commerce Clause. It is sheer sophistry to suggest that Oregon's current statutory scheme, which has precisely the same economic effect, would run afoul of the Constitution. *See Complete Auto Transit v. Brady*, 430 U.S. 274, 284 (1977) (criticizing disparate results in two earlier cases where there was "no real economic difference between the statutes.").

Nor do any of this Court's precedents require a contrary result.[13] In each of its cases since *Henneford v. Silas Mason Co.*, the Court has remained faithful to the principle that a State fee or tax violates the Commerce Clause only where it results in discrimination in its actual operation. Thus in *Halliburton Oil Well Cementing Co.*, the Court invalidated the Louisiana use tax only because it subjected foreign, but not local goods to tax on the amount of labor and shop overhead attributable to manufacture of a product. 373 U.S. at 70-71. Similarly, in *Maryland v. Louisiana*, the Court invalidated Louisiana's "first use" tax on petroleum extracted from the outer continental shelf and processed in Louisiana for interstate shipment because it would result in inequality, rather than equality of treatment of interstate and local commerce. As the Court noted:

> The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate. Here, Louisiana claims that the First-Use Tax compensates for the effect of the State's severance tax on local production of natural gas. To be sure, Louisiana has an interest in protecting its natural resources, and, like most States, has chosen to

---

[13]Petitioners' repeated suggestion that this Court's decision in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) controls the outcome of this case borders on the frivolous. There, this Court *expressly declined to decide* the issue presented in this case because, in *Chemical Waste Management*, "The State present[ed] no argument . . . that the additional fees make out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities." 112 S. Ct. at 2016 n.9.

> impose a severance tax on the privilege of severing resources from its soil. But the First-Use Tax is not designed to meet these same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. The two events are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. *No such equality exists in this instance.*

451 U.S. at 758-59 (emphasis added; citations omitted).

Here, of course, the State *has* identified "the burden for which [it] is attempting to compensate," namely that the activities that generate waste elsewhere have not been subject to the panoply of state taxes that Oregon uses to fund its waste programs. Those who generate waste in Oregon pay taxes to Oregon, some of which support the State's solid waste efforts. Requiring those who ship waste to Oregon to similarly pay those same costs, though in a different form, shows that equality *does* exist in this instance, at least for purposes of the facial validity of the statute.[14]

Similarly, in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court invalidated an in-state manufacturer exemption from the State's wholesale tax because it would result in discrimination in fact against out-of-state manufacturers. The Court rejected the

---

[14]Petitioners' suggestion that Oregon's general tax laws fall on a "much larger — and entirely different — group of taxpayers" than those who generate waste in Oregon, Pet. Br. at 25, fails to recognize that, by its very nature, solid waste (which is simply another term for simple trash) is generated by anyone having activities in Oregon and certainly would be generated by anyone having sufficient activities in Oregon to be subject to the State's general income tax. Moreover, mathematical precision is not required. As this Court has noted, it is enough if the fees reflect a "fair, if imperfect, approximation of the use of the facilities." *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972).

notion that the exemption compensated for a higher manufacturing tax because of the actual operation of the manufacturing tax:

> Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing and which portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

467 U.S. at 643 (footnotes omitted).[15]

In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), the vice in the state tax scheme at issue again was that it generated inequality, rather than equality. In particular, a business that engaged in manufacturing and wholesaling entirely within the State was protected from the possibility of multiple taxation by an exemption, while a similarly situated business that engaged in one of those activities in another State was not. 483 U.S. at 246-247. Thus, the

---

[15]The Court also applied what it termed the "internal consistency" test, noting that if other States enacted similar taxing schemes the result would be discrimination against interstate commerce. 467 U.S. at 644. Thus, the Court noted, "If Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — the Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* In the present case, however, even if all other States enacted systems like Oregon, there would be no impermissible discrimination against interstate commerce. Residents of all of the States would pay for environmental programs relating to waste they disposed of in their own States through general taxation (or specific fees), and would pay for similar programs for exported waste through specific fees. In neither circumstance would they be required to pay more than the cost of those programs simply because they chose to dispose of the waste abroad rather than at home.

Court held that the tax was "inconsistent with our precedents holding that a tax violates the Commerce Clause 'when it unfairly burdens commerce by exacting *more than a just share* from the interstate activity.'" *Id.* at 247 (emphasis added).[16]

Finally, in *American Trucking Associations, Inc. v. Schiener*, 483 U.S. 266, the Court invalidated Pennsylvania's flat fees because they operated to impose a higher per-mile cost on non-Pennsylvania based trucks. Thus, to the extent any claim was made that the fees were calibrated to reflect costs of State facilities, the structure of the fees would ensure that interstate carriers paid *more* than their fair share of those costs. Obviously, then, no argument was open to Pennsylvania that the flat fees represented some fair approximation of the costs of road use imposed by such trucks. Indeed, as the Court noted, "[the fees] *do not even purport to* approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.* at 291. (emphasis added).

In considering and rejecting Pennsylvania's argument that the taxes could be said to "compensate" for higher registration fees paid by intrastate truckers, the court noted that "even if the relative amounts of the States' registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities that result from each State's choice of tax levels." *Id.* at 288.[17]

---

[16]Moreover, the State in *Tyler Pipe* made no attempt to justify the tax differential as reflecting only the costs of governmental services for which in-state businesses had already paid through some other form of taxation. Therefore, the Court had no occasion to consider an issue such as that raised by Oregon in this case, and the decision cannot be viewed as expressing any conclusion on such an issue.

[17]Moreover, it is far from clear that such an argument would have been sustainable on the facts of the case. Interstate truckers who traveled in Pennsylvania, at least to the extent that they were based in States participating in the "International Registration Plan" ("IRP") were required to pay that portion of the Pennsylvania registration fee that reflected the proportion of miles they traveled in Pennsylvania. *See* 483 U.S. at 271-273 (describing operation of the IRP). Thus, to the extent that Pennsylvania's high registration fees created a "competitive disadvantage," that disadvantage was proportionately shared by

However, the question of whether a State can constitutionally discriminate in order to eliminate a competitive disadvantage that it has itself imposed on its local industries, the question considered by the Court in *Scheiner*, is fundamentally different from the question of whether a State can require interstate commerce to pay its fair share of the costs such commerce imposes on the State without totally restructuring its tax system. The Court's cases seeming to require that a tax be on a "substantially equivalent event," *e.g.*, *Armco; Tyler Pipe*, were decided in the former, rather than the latter context. To extend such a rule to a case such as this, where the State seeks only to recover actual costs that interstate commerce imposes upon it, and otherwise does not pay is wholly unwarranted.[18]

Petitioners' argument, if accepted would require a State to either subsidize interstate commerce, or completely restructure its taxing system. The former is clearly not required by the Commerce Clause, as this Court has repeatedly stated that interstate commerce may be made to pay its fair share. *E.g.*, *Maryland v. Louisiana*,

---

interstate carriers. Carriers based in those non-IRP states with reciprocity agreements with Pennsylvania were, of course, required to pay a registration fee to their home states, *id.*, but as the Court noted, "while it is true that registration fees are lower in some States, they are also higher in some other States." 483 U.S. at 288.

[18]The genesis of the "substantially equivalent event" test is itself somewhat obscure. The language first appeared in *Maryland v. Louisiana*, 451 U.S. at 759, but does not appear to have been the holding in that case, and in any event was expressly tied to the unequal manner in which the State taxes at issue actually operated. *Id.* In *Armco*, the "substantially equivalent event" dictum was seemingly elevated to a holding, 467 U.S. at 643, but the Court again expressly tied it to the State's disparate tax treatment of the two, which resulted in the tax scheme at issue being actually discriminatory. *Id.* It was not until *Tyler Pipe* that the Court appeared to divorce the "substantially equivalent event" test from its moorings in actual, rather than merely apparent discrimination. 483 U.S. at 244. The Court has never explained why the "substantially equivalent event" test is constitutionally required, or, for that matter, why sales and use are "substantially equivalent events," but manufacturing and wholesaling are not, except in the context of a finding of actual discrimination.

451 U.S. at 754; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). The latter is a radical departure from principles of federalism which generally allow a State to structure its tax system as it sees fit, so long as that system ultimately does not discriminate against interstate commerce. "'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.'" *Henneford v. Silas Mason Co.*, 300 U.S. at 584 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)).

In sum, petitioners have "'failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact.'" *Id.* Accordingly, the judgment of the Supreme Court of Oregon should be affirmed.

CONCLUSION

For the reasons stated above, the Amici States and Commonwealths respectfully urge that the Court affirm the judgment of the Supreme Court of Oregon.

Respectfully Submitted,

Pamela Carter
Attorney General of Indiana
Arend J. Abel
Matthew R. Gutwein
Myra P. Spicker
Deputy Attorneys General
219 State House
Indianapolis, Indiana 46204
(317) 232-6243

Winston Bryant
Attorney General of Arkansas
Office of the Attorney General
Tower Building
323 Center Street
Little Rock, Arkansas 72201-2610

Robert A. Butterworth
Attorney General of Florida
Office of the Attorney General
The Capitol
PL 01
Tallahassee, Florida 32399-1050

Chris Gorman
Attorney General of Kentucky
Office of the Attorney General
State Capitol Building
Frankfort, Kentucky 40601

Michael E. Carpenter
Attorney General of Maine
Department of the Attorney General
State House Station 6
Augusta, Maine 04333

Mike Moore
Attorney General of Mississippi
Office of the Attorney General
Department of Justice
P.O. Box 220
Jackson, Mississippi 39205-0220

Joseph P. Mazurek
Attorney General of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1401

Lee Fisher
Attorney General of Ohio
Office of the Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410

Susan B. Loving
Attorney General of Oklahoma
Office of the Attorney General
State Capitol
2300 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105

Ernest D. Preate, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
Strawberry Square
Fifteenth Floor
Harrisburg, Pennsylvania 17120

T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
Rembert C. Dennis Office Building
Post Office Box 11549
Columbia, South Carolina 29211-1549

James E. Doyle
Attorney General of Wisconsin
Wisconsin Department of Justice
Post Office Box 7857
123 West Washington Avenue
Madison, Wisconsin 53707-7857

Mark Barnett
Attorney General of South Dakota
Office of the Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070

Joseph B. Meyer
Attorney General of Wyoming
Office of the Attorney General
State Capitol Building
Cheyenne, Wyoming 82002

December 7, 1993